IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILLMORE MERCANTILE, INC.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
ETM ENTERTAINMENT NETWORK, INC.	:	**NO. 98-4133**

M E M O R A N D U M

WALDMAN, J. **March 29, 1999**

Plaintiff asserts breach of contract claims against defendant ETM (formerly known as Winpoint) arising from a proposed business venture for the handling of concert ticketing. Plaintiff is a Delaware corporation with offices in California, New York and Philadelphia. Defendant is a Nevada corporation with its principal place of business in California. The action was initiated in the Common Pleas Court of Philadelphia and removed to this court.

Defendant has filed a motion to dismiss for lack of personal jurisdiction and for improper venue, and an alternative motion to transfer this action pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Southern District of California. From the parties' affidavits and submissions, the pertinent facts for purposes of the instant motions are as follow.

The parties entered into discussions in 1994 regarding a business venture to handle concert ticketing, including ticketing for the 1995 tour of the rock band Pearl Jam. Plaintiff represented it had the right to license use of certain ticketing software, and that it would deliver to defendant an executed agreement with Pearl Jam by which defendant would handle the ticketing for their 1995 tour.

Fox Entertainment Systems, Inc., based in Kulpsville, Pennsylvania and then controlled by plaintiff, presented a letter proposal to defendant on October 31, 1994. The letter confirmed a November 2, 1994 meeting to be held in Irvine, California. Ray Garman, a Fox Entertainment board member and president of plaintiff, which was located in Carlsbad, California, and Fox Entertainment's president, David Cooper, attended the November 2, 1994 meeting in Irvine. Mr. Garman's business card lists office addresses and telephone numbers in Philadelphia and Carlsbad.

Mr. Cooper faxed defendant a letter on November 4, 1994 confirming a subsequent meeting to be held the next day. The cover sheet bore the name and address of plaintiff's Carlsbad, California office. The actual letter was printed on Fox Entertainment stationery and bore its Kulpsville, Pennsylvania address. The subsequent meeting of November 5, 1995 was held in California.

On November 17, 1994, defendant submitted to Fox Entertainment's Kulpsville office a proposal for "Definitive Agreements with Fox or an affiliated entity designated by it . . . whereby Fox will supply to Winpoint, for use by Winpoint in the establishment of a national outlet ticketing, merchandising, and promotion system, management or employment services in the form of certain Fox personnel." On December 26, 1994, plaintiff faxed from its Philadelphia office to defendant in California proposed changes.

On January 11, 1995, Fox Entertainment submitted from its Kulpsville office a letter to defendant setting forth "two of the key terms relating to the proposed business dealings between The Fox Group, which includes Fox Productions, Inc. and/or an affiliated entity designated by it, David B. Cooper, William Bullock, Michael Green and Fillmore Mercantile Incorporated (collectively referred to as 'The Fox Group')." Those terms called for the sale to Fox Entertainment or a Fox affiliate of 1,000,000 shares of defendant's stock in exchange for cash, and for defendant to compensate several Fox employees, including David Cooper, for their professional services. On January 13, 1995, defendant forwarded to Mr. Garman at plaintiff's Philadelphia office additional information regarding the negotiations and a request for a draft of the stock purchase

agreement "so that we may consummate this transaction later next week."

On January 19, 1995, defendant faxed additional information relating to the parties' negotiations to Ellen Moffett, plaintiff's chief operating officer and general counsel, at plaintiff's Philadelphia office. It stated, inter alia, "We are all looking forward to a long and profitable relationship." On January 23, 1995, plaintiff faxed a signed stock purchase agreement from the Carlsbad office.

On January 27, 1995, representatives of defendant met with plaintiff in Ardmore, Pennsylvania, to discuss the parties' future relationship. On February 14, 1995, defendant faxed detailed comments to Ms. Moffett in Philadelphia reflecting the parties' negotiation of the so-called "Winpoint Deal Memo." According to the fax, plaintiff "and Winpoint agree to explore the options of forming a new company or retaining Winpoint as the legal entity to initiate the ticketing business."

The next day, defendant, Mr. Garman on behalf of plaintiff and Mr. Cooper as president of the Fox Group, signed the Winpoint Deal Memo agreeing to "jointly move forward" with projects "presently underway." The Memo was negotiated and signed in California, as was a promissory note with a California choice of law provision.

To carry out the parties' agreements, plaintiff was required to establish a number of "Pearl Jam accounts." Correspondence from plaintiff indicates that its employees responsible for establishing the accounts were located in California. Plaintiff later signed a collateral assignment of the Pearl Jam accounts in California. Under the Winpoint Deal Memo, plaintiff was to loan $500,000 to defendant. The loan funds were to be held in an account at CoreStates Bank in Philadelphia. Defendant would access the funds by submitting check requests and supporting documentation to plaintiff's chief financial officer in Philadelphia. Payments for the loan were to be sent to plaintiff's Philadelphia office. Interest was to be calculated on rates provided by CoreStates Bank.

On February 16, 1995, defendant sent a fax to Ms. Moffett at plaintiff's Philadelphia office indicating that defendant intended to do business as ETM and requesting that Ms. Moffett determine whether any other business was using that name. In March 1995, Ms. Moffett had the Philadelphia law firm of Klehr, Harrison, Harvey, Branzburg & Ellers prepare fictitious name registrations for ETM Entertainment Network in Nevada, Idaho and California.

On April 4, 1995, Klehr Harrison prepared name change documents, including resolutions and a corporate Certificate of Amendment, by which Winpoint would change its name to ETM and

forwarded them to defendant for review and signature. Defendant's president, Gene Heckerman, signed the certificate of amendment. The certificate is notarized as having been signed by Mr. Heckerman and Peter Schneidermeier, defendant's secretary, in Philadelphia. It appears the signatures may in fact have been affixed in California. The completed name change documents were filed by Klehr Harrison, changing defendant's name to ETM. ETM's name reservations maintained addresses at CT Corporation System in Philadelphia. The name reservations were maintained for ETM by Ms. Moffett in plaintiff's Philadelphia office.

Defendant indicated its desire to establish east coast operations. Discussions were held with City officials to obtain assistance to Winpoint in setting up an east coast phone room in Philadelphia. Ultimately, no such facility was established.

On February 26, 1995, Mr. Heckerman came to Philadelphia. Plaintiff represents that Mr. Heckerman came to Philadelphia to discuss the relationship between the parties. Defendant represents that Mr. Heckerman stayed in Philadelphia two nights and met only with Ms. Moffett for the purpose of picking up a balance sheet.

On March 17, 1995, defendant faxed to Ms. Moffett in Philadelphia a letter requesting advice regarding defendant's possible expansion to Europe. On April 18, 1995, defendant sent a fax to Ms. Moffett in Philadelphia requesting advice regarding

a proposed sublease for defendant's office space. On May 5, 1995, Mr. Garman responded, from plaintiff's Philadelphia office, to a request by defendant for additional funding by wiring $40,000 and faxing a letter voicing concern over defendant's ability to meet its obligations. On May 15, 1995, defendant sent a letter to Ms. Moffett in Philadelphia requesting that she advise defendant's auditors of the terms of the promissory note defendant had given to plaintiff.

On June 7, 1995, defendant faxed to Ms. Moffett in Philadelphia reports on ticket sales for various concerts. On August 3, 1995, defendant faxed to plaintiff's Philadelphia office information regarding negotiations between the parties. Tom Lanigan, defendant's vice-president for corporate development, attended a meeting in Philadelphia regarding the technological plan for setting up a national ticketing system.

Plaintiff is seeking to enforce its rights under the Winpoint Deal Memo, the promissory note and the stock agreement. Plaintiff alleges that defendant has failed to repay debt owed to plaintiff and to deliver stock certificates to plaintiff.

Once a defendant asserts lack of personal jurisdiction, the burden is upon the plaintiff to make a prima facie showing with sworn affidavits or other competent evidence that such jurisdiction exists. Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 66-67 n.9 (3d Cir. 1984); Leonard A. Fineberg, Inc. v. Central Asia Capital Corp., 936 F. Supp. 250,

253-54 (E.D. Pa. 1996); Modern Mailers, Inc. v. Johnson & Quin, Inc., 844 F. Supp. 1048, 1051 (E.D. Pa. 1994). To make such a showing, a plaintiff must demonstrate "with reasonable particularity" contacts between the defendant and the forum sufficient to support an exercise of personal jurisdiction. Mellon Bank (East) PSFS Nat'l Assoc. v. Farino, 960 F.2d 1217 (3d Cir. 1992).

General personal jurisdiction may be established by showing that a defendant conducts a continuous and systematic part of its business in the forum. Fields v. Ramada Inn, 816 F. Supp. 1033, 1036 (E.D. Pa. 1993). Contacts are continuous and systematic if they are "extensive and pervasive." Id.

Specific personal jurisdiction may be established by showing that a defendant undertook some action by which it purposefully availed itself of the privilege of conducting activities within the forum and thus invoking the benefits and protections of the laws of the forum. Hanson v. Denckla, 357 U.S. 235, 253 (1958). To invoke specific jurisdiction, a plaintiff's cause of action must arise from or relate to the defendant's forum related activities, such that the defendant should reasonably anticipate being haled into court in the forum. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984); Worldwide Volkswagen Corp. V. Woodson, 444 U.S. 286, 297 (1980); North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 690 (3d Cir.), cert. denied, 498 U.S. 847 (1990). A determination of whether sufficient minimum contacts exist

essentially involves an examination of the relationship among the defendant, the forum and the litigation. Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

Once a showing of sufficient minimum contacts has been made, a defendant may show that an exercise of personal jurisdiction is nevertheless incompatible with due process by presenting compelling evidence of other factors which would make an order requiring it to litigate in the chosen forum inconsistent with "fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); D'Almeida v. Stork Brabant B.V., 71 F.3d 50, 51 (1st Cir. 1995); Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 481 (3d Cir. 1993).

Courts employ a realistic approach and consider prior negotiations, contemplated future consequences, the terms of a contract and the parties' actual course of dealing. See Mellon Bank (East) PSFS Nat'l. Assoc., 960 F.2d at 1225.

Defendant sought a business relationship with Pennsylvania-based Fox Entertainment or an affiliate to be designated by Fox. Plaintiff was that affiliate. Defendant corresponded and communicated with plaintiff and its agents in the forum on matters of importance to defendant's business interests and touching on core aspects of the parties' dealings. The parties contemplated a "long and profitable relationship," as

part of which defendant hoped to establish operations in the forum. Defendant created continuing relations and obligations between itself and a forum resident. Defendant reasonably could expect to have to litigate in this forum disputes arising from that relationship and those obligations.

Plaintiff has sufficiently established a prima facie case of specific personal jurisdiction. Defendant has not presented a "compelling case" that for other reasons the assertion of personal jurisdiction would be unreasonable or incompatible with "fair play and substantial justice."

Removal of a case from state court does not waive a defendant's right to object to lack of venue in the state court. See PT United Can Co., Ltd. v. Crown Cork & Seal Co., Inc., 138 F.3d 65, 73 (2d Cir. 1998); Lambert v. Kyser, 983 F.2d 1110, 1113 n.2 (1st Cir. 1993); Tanzman v. Midwest Express Airlines, Inc., 916 F. Supp. 1013, 1018 (S.D. Cal. 1996). Rather, "after removal, the federal court merely takes up the case where the state court procedurally left off." Dunn, By and Through Tatum v. Skate 22, Inc., 1997 WL 786439, *1 (E.D. Pa. Nov. 24, 1997).

Some of the pertinent discussions occurred in Philadelphia. Defendant engaged in a course of negotiations which included the transmission of key information, terms and documents to plaintiff in Philadelphia. Check requests and loan payments were directed by defendant to plaintiff in Philadelphia.

The stock purchase agreement was to be consummated with the delivery of defendant's stock certificates to plaintiff in Philadelphia. The loan agreement contemplated repayment to plaintiff in Philadelphia. There were transactions and occurrences in Philadelphia out of which this action arises. This is sufficient to establish venue in the Court from which the action was removed. See Pa. R. Civ. P. 2179(a)(4).

The movant bears the burden of establishing the need for a transfer.

In ruling on a § 1404(a) motion, courts consider relevant private and public interests including the plaintiff's choice of forum; the defendant's preference; whether the claim arose elsewhere; the convenience of the parties and witnesses; the location of records to the extent they could be produced in one forum but not the other; the enforceability of a judgment; practical considerations that could make a trial easier, more expeditious or less inexpensive; the local interest in deciding local controversies at home; the public policies of the fora; and, the familiarity of the court with any applicable state law. See Jumara v. State Farm Ins. Co., 55 F.3d 873, 879-80 (3d Cir. 1995). A plaintiff's choice of forum "should not lightly be disturbed." Id. at 879.

While most of the face-to-face meetings and work occurred in California, there were key transmissions from

defendant to plaintiff in the forum. The documents creating the obligations the alleged breach of which give rise to plaintiff's claims were signed in California but contemplated some key acts of performance in the forum. While plaintiff's claims have a more substantial connection to the Southern District of California, they are not unrelated to activity in this district. Both California and Pennsylvania have a policy and an interest in ensuring a remedy for the breach of legal duties by or to entities doing business in or with their residents.

It is uncontested that defendant does not maintain operations in this district, while plaintiff conducts significant operations in the Southern District of California where its president maintains an office.

Defendant simply states that all of its witnesses reside in California. There has been no showing that any witnesses would be available for trial in one forum but not the other. Indeed, neither party has specifically identified any essential witness not subject to its control.

Not surprisingly, defendant's records are in California and most of plaintiff's pertinent records are in Philadelphia. There has been no showing, however, that any needed records could not be produced in both fora.

One of the parties' agreements is governed by Delaware law. At least two of the agreements at issue will likely be

governed by California law. The promissory note contains a choice of law provision. The Winpoint Deal Memo was executed in California. See Gruen Watch Co. v. Artists Alliance, Inc., 191 F.2d 700, 703 (9th Cir. 1951) (contracts signed in California are generally governed by California law in absence of manifestation of parties' intent that another jurisdiction's laws will govern); Mercantile Acceptance Co. v. Frank, 265 P. 190, 191 (Cal. 1928); Tytel v. Tytel, 131 Cal. App.3d 119, 126 (1982); Cohen v. Metropolitan Life Ins. Co., 89 P.2d 732, 736 (Cal. App. 1939).

Neither party has averred that its operations would be unduly disrupted if it were required to litigate in the other party's preferred forum. Neither party has averred that it has the means to litigate in one forum but not the other. It appears that the principals of both parties are accustomed to transcontinental business travel.

Plaintiff has a connection to this forum and at least some of the conduct underlying the litigation occurred here. In such circumstances, a plaintiff's choice of forum is entitled to substantial weight. Defendant has not made a convincing showing that other relevant applicable factors outweigh plaintiff's choice.

Accordingly, defendant's motions will be denied. An appropriate order will be entered.

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O R D E R

AND NOW, this day of March, 1999, upon consideration of defendant's Motion for Dismissal Pursuant to F.R.C.P. 12(b) and alternative Motion for Transfer Pursuant to 28 U.S.C. § 1404(a) (Doc. #2, Parts 1 and 2), and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motions are **DENIED.**

BY THE COURT:

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JAY C. WALDMAN, J.